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No. 71-1114

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY FIOTTO, ROBERT JAMES, PETER HOMBACH, AND VINCENZO SACCOCCIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 454 F.2d 252.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on January 4, 1972. On January 18, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March 4, 1972, and the petition was filed on March 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

463-588—72——1

QUESTION PRESENTED

Whether the mandatory minimum penalties prescribed by narcotics laws that were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970 apply to offenses for which convictions occurred before the effective date of the Act but with respect to which sentence was imposed after that date.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate federal narcotics laws, and petitioner Fiotto was convicted of the substantive offense which was the object of the conspiracy (receiving, concealing and facilitating the transportation of heroin hydrochloride, in violation of 21 U.S.C. (1964 ed.) 173 and 174) (Pet. App. D–G; App. pp. 443–444).[1] Fiotto was sentenced to concurrent ten-year terms of imprisonment and fined $20,000; petitioner James was sentenced to seven years' imprisonment, and petitioners Hombach and Saccoccio were each sentenced to five years' imprisonment (Pet. App. D–G; App., pp. 475–476). The court of appeals affirmed (Pet. App. B).

1. The pertinent facts are not disputed here and are set forth fully in the opinion of the court of appeals. Between 1966 and 1970, petitioners participated in a conspiracy to deal in heroin unlawfully imported into the United States. In December 1966,

[1] "Pet. App." refers to the appendices to the petition. "App." refers to the appendix filed by petitioners in the court below, a copy of which we are filing herewith.

Roberto Largan, a Philippine citizen, was introduced to one Guillermo Prillo[2] in New York City (App., p. 14). Largan asked Prillo whether he could locate prospective customers for heroin (App., pp. 18, 20). A few days later Prillo and petitioners Fiotto and James met with Largan and worked out an arrangement (App., pp. 27–31).

In March 1967, Fiotto and James contacted Largan in the Phillipines concerning obtaining some heroin. A short time later one Benito Lee arrived in New York and notified Prillo that he was prepared to deliver one kilo of heroin (App., pp. 35–38). Lee and Prillo met with Fiotto and James and petitioner Hombach, and the heroin was given to Hombach who then departed. About an hour later petitioner Saccoccio returned with the heroin, explaining that the buyer believed that it was synthetic and did not want it (App., pp. 39–51). Lee and Prillo again met with Fiotto, James and Hombach several days later (App., pp. 52, 54). Hombach was given the heroin, left, and returned with $6,000 which he gave James (App., pp. 55–60). During this same period Largan returned to New York and delivered 2½ kilos of heroin to Fiotto and James (App., pp. 62–73).

In May 1968, Guillermo Castillo,[3] a courier for Largan, made two deliveries of heroin to Fiotto (App., pp. 175–188). Some two years later federal officials searched Castillo as he was entering the

[2] Prillo was named as a defendant in the conspiracy count. His case was severed from that of petitioners.

[3] Castillo was also named as a defendant in the conspiracy count, and his case was severed from that of the others.

United States and found that he had 2½ kilos of heroin (App., pp. 188–189). Castillo agreed to cooperate and identified Fiotto as his customer (App., pp. 190–191). He met with and transferred the heroin to Fiotto, after which Fiotto was arrested (App., pp. 192–194).

2. Petitioners were tried during December 1970, and the jury returned the guilty verdicts on December 16, 1970 (App., p. 2A). Sentencing was deferred so that presentence investigations could be completed, and the sentences finally were imposed on June 18, 1971 (App., pp. 3A, 445–476).

The statutes prescribing the substantive offenses involved here (21 U.S.C. (1964 ed.) 173 and 174) provided for a five-year mandatory minimum prison term. Effective May 1, 1971—subsequent to petitioners' convictions but prior to the imposition of sentences—those statutes were repealed and replaced by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Secs. 1101, 1105(a), 84 Stat. 1291, 1295. During the sentencing hearing it was suggested that the new Act applied, and that therefore the trial judge was not limited by the old Act's mandatory minimum in assessing the sentences (App., pp. 461–462, 467, 473). The judge sentenced each petitioner to terms of imprisonment as indicated above without discussing this matter (App., pp. 473–476). In the court of appeals petitioners claimed that they should have been sentenced under the new Act; that court concluded that in the situation here the sentencing provisions of the old statutes applied (Pet. App. B, pp. 8a–9a).

ARGUMENT

Petitioners' sole contention here is that they should have been sentenced under the provisions of the new Act. Petitioners Fiotto and James have no basis for making this contention, however. They were sentenced to prison terms (ten years and seven years, respectively) that exceed the minimum term under the old law (five years), and hence the mandatory minimum did not affect their sentences. Cf. *United States* v. *Bates*, 429 F. 2d 557, 560 (C.A. 9), certiorari denied sub nom. *Isbell* v. *United States*, 400 U.S. 831, and *Green* v. *United States*, 400 U.S. 916.

In any event, the court below correctly rejected this claim. As discussed in our brief in opposition in *Wooden* v. *United States*, No. 71-6085,[4] in the circumstances of this case the repealed provisions remain fully effective for sentencing purposes by reason of the special saving clause of the new Act (Section 1103(a), 84 Stat. 1294) and the general federal saving statute (1 U.S.C. 109). Compare *Duffel* v. *United States*, 221 F. 2d 523 (C.A. D.C.), and *United States* v. *Taylor*, 123 F. Supp. 920 (S.D.N.Y.), affirmed, 227 F. 2d 958 (C.A. 2), certiorari denied, 353 U.S. 961.

Petitioners' claim (Pet. 4–6) that the decision here conflicts with *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9), does not, we submit, warrant further review. Although the court below expressed disagreement with *Stephens*, there is no conflict. The issue in *Stephens* was whether 26 U.S.C. (1964 ed.) 7237(d), which prohibited probation or suspension of sentence with respect to offenses defined by various narcotics

[4] We are sending a copy of our brief to each petitioner.

statutes that, like Section 7237(d), were repealed by the 1970 Act, still applied to offenses committed prior to the new Act's effective date. The Ninth Circuit concluded that the saving clauses referred to above required only that judgment be entered under the old statutes, and did not have any bearing on post-judgment matters, like probation and suspension. The issue in the present case, on the other hand, concerns the minimum penalty imposed by the old provisions; the court in *Stephens* recognized that this was different from post-judgment matters, and in fact pointed out that the defendant there had been sentenced to "the minimum prescribed" by the old statutes (449 F. 2d at 104).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] We believe that the rationale which supports applying the old penalty provisions for offenses committed prior to the 1970 Act also supports applying the Section 7237(d) bar against probation and suspension in such cases, and thus that *Stephens* was incorrectly decided. The issue, however, does not have continuing significance. The 1970 Act applies to all offenses committed after its effective date (May 1, 1971) and the old statutes control where sentencing occurred prior to that date; the question could arise, therefore, only in those cases which straddle the old statutes and the 1970 Act.

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